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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1995

STEPHEN M.
Petitioner

vs.

PAMELA N.
Respondent

PETITION FOR WRIT OF CERTIORARI
To The Court of Appeal of California,
First Appellate District, Division Four

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QUESTIONS PRESENTED

1. Whether a state appellate court's application of a waiver rule, after briefing which showed that such application was contrary to 40 years of settled state law, is adequate to bar this Court from reviewing a federal constitutional question;

2. Whether a state appellate court's application of a waiver rule to bar consideration of a federal constitutional question was so arbitrary and lawless as to render the process of appellate adjudication itself a violation of due process requiring remand to the state court for determination of the federal question; and

3. Whether a husband has a constitutionally protected right of reproductive choice regarding the use of his sperm sufficient to relieve him of the duty to support a child conceived by his wife's insemination of herself with his fraudulently obtained sperm.

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PETITION FOR WRIT OF CERTIORARI
To The Court of Appeal of California,
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Petitioner Stephen M. respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Four, in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of California, First Appellate District, Division Four, filed on November 29, 1995, was not published. It is reproduced in the Appendix at App.1.

The trial court's underlying Findings and Order After Hearing, filed May 25, 1994, is reproduced in the Appendix at App. 6.

JURISDICTION

The decision of the Court of Appeal was entered on November 29, 1995. A Petition for Rehearing and a Request for Publication of the Opinion were both denied on December 21, 1995. A Petition for Review to the California Supreme Court was denied on February 14, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Rules of Court, rule 29(a):

> Grounds for Review in Supreme Court
> [Grounds]
> "Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges."

California Rules of Court, rule 976(b):

> Publication of Appellate Opinions
> [Standards of Publication of Opinions of Other Courts]
> "No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
> (2) resolves or creates an apparent conflict in the law;
> (3) involves a legal issue of continuing public interest; or
> (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

STATEMENT

Petitioner Stephen M. and respondent Pamela N. were married in October 1989. Seven months later, in May 1990, Pamela petitioned to dissolve the marriage. In December 1990, Pamela gave birth to a son. Stephen sought nullification of the marriage on the basis of fraud, and disputed paternity.

After blood tests established that Stephen was the child's biological father, Stephen abandoned his challenge to paternity but reserved the right to challenge Pamela's entitlement to child support on the ground that the child's conception had been accomplished by fraud.

In June 1992, Stephen obtained a stipulated judgment of annulment based on fraud. The judgment awarded temporary child support, but declared that the issue of permanent child support was reserved. (App. 7, ¶ 7) Stephen subsequently moved to terminate child support on the ground that Pamela had obtained Stephen's semen by fraudulent means and inseminated herself without his consent, resulting in the birth of the child.

In his declaration in support of the motion, Stephen stated that on January 2, 1990, after becoming aware of various fraudulent misrepresentations made by Pamela before the marriage, he declared his intent to seek a divorce. Pamela's premarital fraud included her concealment of her intention to have children in direct opposition to Stephen's expressed desire not to have any more children. After discovering the fraud, Stephen stopped engaging in sexual intercourse with Pamela and asked her to find another place to live, meanwhile moving her to a spare bedroom.

Despite Pamela's knowledge of Stephen's aversion to having children with her, she continued by various fraudulent means, to attempt to induce him to have sexual relations with

her.[1] On March 27, 1990 Pamela came to Stephen's room as he was falling asleep and began fondling him. Stephen asserts that no vaginal intercourse occurred, but that he ejaculated semen on her body in response to the stimulation. After ejaculating, Stephen went into the bathroom to get some tissue for Pamela, and on his return found her manually inserting his semen into her vagina. It was this act of self-actuated impregnation that resulted in the conception of Pamela's child.

Stephen argued in the trial court that because Pamela had inseminated herself without vaginal intercourse, the child's conception resulted from artificial insemination and that under California law governing artificial insemination, Stephen, having withheld his consent to insemination, had no legal obligation to support the child. For purposes of its ruling, the trial court deemed the facts set forth in Stephen's declaration to be true, but concluded that Stephen's lack of consent did not relieve him of his legal responsibility to support the child.

On appeal, Stephen raised, in addition to his state law claim regarding artificial insemination, a federal constitutional claim based on the argument that the Due Process Clause of the Fourteenth Amendment gives him a right of reproductive choice in the use of his sperm, sufficient to relieve him of the duty to support a child conceived by artificial insemination without his consent. Corrected Appellant's Opening Brief, App. 11-30.

In response to an indication from the Court of Appeal at oral argument that petitioner had waived the constitutional claim by failing to raise it in the trial court when he made his motion to terminate child support, petitioner sought and received permission to file a supplemental letter brief prior to submission of the case for decision. In that letter brief,

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[1] On one occasion, for example, Pamela staged a fake phone call from a clinic informing him that she was pregnant, apparently hoping that if Stephen believed she was already pregnant by him, he would then agree to have — or at least not resist having — sexual intercourse with her.

petitioner set forth more than 40 years of precedent showing that the California Supreme Court, since 1956, and the state Courts of Appeal, in more than 20 cases, have consistently declined to apply a rule of waiver when, as here, the facts are undisputed[2] and only a new legal theory, consistent with those facts, is presented on appeal. *Panopulos v. Maderis,* 47 Cal.2d 337, 340-341 (1956); *Ward v. Taggert,* 51 Cal.2d 736, 742 (1959); *Burdette v. Rollefson,* 52 Cal.2d 720 (1959); and cases cited in Supplemental Letter Brief, App. 31-37.[3] The letter brief also suggested, in abbreviated form, that the Court of Appeal's failure to reach the constitutional claim would itself violate due process. App. 41.

Despite the overwhelming case law supporting petitioner's right to raise his constitutional claim for the first time on appeal, the Court of Appeal applied the waiver rule, stating, without more, that "the theory on which a case is tried must be adhered to on appeal," and that "to permit an appellant to offer a new theory of the case on appeal would be unjust." Opinion, App. 5. The only judicial authority cited by the Court of Appeal was a 1933 California Supreme Court decision, *Ernst v. Searle,* 218 Cal. 233, 240-41 (1933), which had been clearly modified in the fifties by the California Supreme Court cases cited above and cited to the Court of Appeal in both petitioner's opening brief, App. 13, and in his Supplemental Letter Brief,

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[2] In ruling on petitioner's motion to terminate child support, the trial court deemed true all the facts set forth in Stephen's motion to terminate child support. Findings and Order After Hearing, App. 6, ¶ 1.

[3] In the one case petitioner found in which a rule of waiver was applied despite a record of undisputed facts, *Bihun v. AT&T Information Systems, Inc.,* 13 Cal.App.4th 976 (1993), the new theory raised on appeal was "directly contrary" to the position taken at trial. *Id.* at 1000. In this case, the constitutional theory is consistent with the state law claim presented to the trial court.

App. 33-36.

Stephen, in a petition for rehearing, once again directed the Court of Appeal's seemingly willful inattention to this more recent and authoritative California case law creating an exception to the raise-or-waive rule for cases similar to the one at bar. App. 42-44. The petition for rehearing was denied without opinion. App. 8.

The controlling case law on the general rule of waiver and the exception applicable here was cited and discussed again in a Petition for Review to the California Supreme Court. The Petition for Review also raised the issues presented by this petition for writ of certiorari: (1) that petitioner's failure to raise the federal constitutional issue of reproductive freedom in the trial court did not constitute an adequate state ground to preclude review of the federal question; and (2) the Court of Appeal's failure to reach the merits of the constitutional claim itself violated petitioner's constitutional rights under the Supremacy Clause, the Equal Protection Clause, and the Due Process Clause. App. 45-50. The Petition for Review was denied on December 21, 1995. App. 10.

REASONS FOR GRANTING THE PETITION

Introduction

The California Court of Appeal, by invoking the state's general waiver rule to bar consideration of petitioner's constitutional claim of reproductive choice, avoided deciding a federal question in a way that goes well beyond a conflict with applicable decisions of this Court relating to the adequate state ground doctrine. The Court of Appeal has frustrated the assertion of a federal right in a manner so arbitrary and lacking in candor as to produce what Karl Llewellyn, in his classic work on appellate adjudication, described as a "novel corrosiveness" in the appellate process. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4 (1960) [hereinafter cited as LLEWELLYN]. Additionally, and perhaps

most seriously, the state court has done so by a method capable of repetition, yet evading review.

The method of deciding appeals that petitioner challenges here not only subverts the doctrine of stare decisis, but worse, the court's lack of candor and completely arbitrary manner of treating legally valid and authoritative arguments by counsel offends the essential spirit of the Due Process Clause with its emphasis upon "a government of law, and not of men" as the "very essence of civil liberty." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). The Due Process Clause "in effect, states that our governments are 'governments of law and constitutionally bound to act only according to law.'" *In re Winship,* 397 U.S. 358, 382 (1970) (Black, J., dissenting); see *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 670 (7th Cir. 1980), *cert. denied,* 449 U.S. 880.

This case thus provides a timely and rare opportunity for this Court to provide effective prophylactic measures to deter state appellate courts from engaging in unconstitutional and morally corrosive practices of appellate adjudication, which, because of the offending court's refusal to publish its opinion, continues to escape appellate review. This issue is important because "it goes to whether there is any reckonability in the work of our appellate courts, and real stability of footing for the lawyer, be it in appellate litigation or in counseling, whether therefore there is any effective craftsmanship for him to bring to bear to serve his client and to justify his being." LLEWELLYN, *supra,* at 4. Indeed, this case provides a stark example of this problem. Counsel, relying on an apparently settled exception to the raise-or-waive rule, spent innumerable hours and thousands of dollars of petitioner's money developing a constitutional argument of first impression. It takes no special sensitivity to imagine, then, the dismay in counsels' and petitioner's reaction to the Court of Appeal's unprincipled, unreasoned, and callously dismissive invocation of the waiver doctrine to avoid even discussing the constitutional claim. As one recent commentator has said, this kind of adjudication has

produced a crisis of professional self-confidence in the appellate process that threatens the very soul of the American legal profession. A. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1, 211-212 (1993).

Finally, the substantive federal question barred by the Court of Appeal's procedural ruling presents important issues of procreative autonomy for men which finally should be resolved by this Court. In the last quarter of a century, this Court, in a series of decisions involving a woman's right to an abortion, has substantially revised the meaning and place of motherhood in American life. See *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992); *Roe v. Wade,* 410 U.S. 113 (1973); K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 107-108 (1984). The momentous significance of this Court's landmark decision in Roe was that, in effect, the case redefined the traditional concept of motherhood by making it a function of choice rather than a "natural" obligation resulting from conception. The biological connection between the woman and her unborn child is no longer sufficient, at least up to the point of viability, to impose the duties of motherhood upon a woman unless she chooses to assume responsibility for the developing life within her.

The question that remains, and which is clearly and dramatically presented by the unusual facts of this case, is whether the traditional concept of fatherhood shall continue to be defined entirely as a function of the biological connection between the child and the man whose sperm contributed to the conception of the child, especially when, as here, no sexual intercourse took place between the mother and the putative father. Whether the biological connection alone is sufficient to impose the duties of fatherhood in the absence of sexual intercourse, or consent by the man to insemination with his sperm, is an important question of federal constitutional law which has not been, but should be, settled by this Court.

I. The Waiver Rule Applied by the State Court Has Not Been Strictly or Regularly Followed by California Courts and Therefore Is Not Adequate to Bar Review by This Court

State courts, under the Supremacy Clause, are required to hear federal claims analogous to the claims they entertain under state law, see *Testa v. Katt,* 330 U.S. 386, 391-394 (1947), and have the same duty as federal courts to adjudicate federal constitutional questions when properly presented, see *Martin v. Hunter's Lessee,* 1 Wheat. 304 (1816). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v Lovorn,* 457 U.S. 255, 263 (1982).

The question of when and how a failure to comply with a state procedural rule can preclude consideration by this Court of a federal constitutional issue is itself a federal question. *Johnson v. Mississippi,* 486 U.S. 584, 587 (1988); *Henry v. Mississippi,* 379 U.S. 443 (1965)). A state procedural ground is not "adequate" to bar determination of a federal issue unless the procedural rule relied on by the state court is "strictly or regularly followed." *Johnson v. Mississippi, supra,* 486 U.S. at 587 (quoting from *Hathorn v. Lavorn, supra,* 457 U.S. at 263); see *Dugger v. Adams*, 489 U.S. 408, 410, n. 6 (1989). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lavorn, supra,* 457 U.S. at 263.

The California Court of Appeal, in refusing to consider respondent's federal claim, stated that "the theory on which a case is tried must be adhered to on appeal," citing a 1933 decision of the California Supreme, *Ernst v. Searle, supra,* 218 Cal. 233, 240-241 (1933) (Opinion, App. 5). In cases such as this, however, where the facts on which the new theory is based are undisputed on appeal, the raise-or-waive rule has not been followed since 1956. See *Panopulos v. Maderis*, 47 Cal.2d 337, 340-41 (1956). By 1959, the California Supreme Court had

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declared, "[I]t is *settled* that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record." *Ward v. Taggert,* 51 Cal.2d 736, 742 (1959) (emphasis added).

This exception to the general waiver rule has been repeatedly reaffirmed by the state's highest court. *Hittle v. Santa Barbara County Employees Retirement Ass'n,* 39 Cal.3d 374, 391 n. 10 (1985); *UFITEC, S.A. v. Carter,* 20 Cal.3d 238, 249, n. 2 (1977); *Burdette v. Rollefson Construction Co.,* 52 Cal.2d 720, 725-726 (1959).[4] The refusal by the Court of Appeal to consider petitioner's constitutional claim thus rested on a procedural rule that has not been followed in California for 40 years. It is therefore inadequate to bar review of the federal constitutional question presented by this petition.

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[4] The practice of considering a new theory on appeal when the facts are undisputed has been consistently followed by California's intermediate appellate courts. See, e.g., *Xiloj-Itzep v. City of Agoura Hills,* 24 Cal.App.4th 620, 633 (1994); *Sanchez v. Truck Ins. Exchange,* 21 Cal.App.4th 1778, 1787 (1994); *Resolution Trust Corp. v. Winslow,* 9 Cal.App.4th 1799, 1809 (1992); *Susan A. v. County of Sonoma,* 2 Cal.App.4th 83, 93 n. 4 (1991); *Peterson Development Co. v Torrey Pines* Bank, 233 Cal.App.3d 103, 117, n 11 (1991); *Seeley v. Seymour,* 190 Cal.App.3d 844, 856 (1987); *State of California ex rel. Public Works Bd. v. Bragg,* 183 Cal.App.3d 1018, 1023-1024 (1986); *In re Marriage of Becker,* 161 Cal.App.3d 65, 75, n. 3 (1984); *Jiminez v. City of Oxnard,* 134 Cal.App.3d 856, 859 (1982); *Molina v. Retail Clerks Unions etc. Benefit Fund,* 111 Cal.App.3d 872, 878 (1980); *Barton v. Owen,* 71 Cal.App.3d 484, 491 (1977).

Appearing to depart from this practice is *Bihun v. AT&T Information Systems, Inc.,* 13 Cal.App.4th 976, 999-1001 (1993). However, the court in *Bihun* pointed out that the new theory was inconsistent with the case presented to the trial court, and concluded that the theory should not be considered because no "manifest injustice" would result. *Id.* at 1000.

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II. The Importance of the Adequate State Ground Issue Arises From the Fact that the Ruling of the Court Below Was So Arbitrary and Lawless as to Render the Process of Appellate Adjudication Itself a Violation of Due Process

A state court ruling that appears to be novel or inconsistent with past practice may nevertheless be a function of a good faith effort by a state court to interpret and apply state law. A failure to apply a state procedural rule in an evenhanded manner may result from a good faith misapplication of existing doctrine, see Meltzer, *State Court Forfeitures of Federal Rights,* 99 Harv.L.Rev. 1130, 1139, n. 44 (1986), or it may be viewed as an implicit revision of existing law, *ibid.*, or as a good faith exception to established doctrine, see *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 966 (N.D. Ill. 1994). The ruling of the Court of Appeal in this case cannot be placed in any of these good faith categories.

Petitioner repeatedly cited to the Court of Appeal the two leading cases of the state's highest court supporting petitioner's argument; and he further presented the Court of Appeal with a survey of more than 60 intermediate appellate cases addressing the waiver issue over a period of 20 years, all but one of which either supported his position or indirectly supported it by consistent distinguishing factors, see Supplemental Letter Brief, App. 31-40. Under these circumstances, the court's departure from these precedents cannot be said to have resulted from an inadvertent misapplication of state law. Nor can the court's procedural ruling be viewed as an implicit effort to revise existing doctrine when it's sole judicial citation is to a 1933 case by the state's highest court which has been clearly superseded in later cases by the same court. And, absent any effort to explain or justify its aberrant decision on the basis of some particular facts or circumstances in the case, the Court of Appeal's decision cannot be viewed as a good faith effort to create an exception to existing doctrine.

The inference that can and must be drawn from the manner in which this case was decided by the Court of Appeals is that the court, for the purpose of evading a federal claim, reached a result it knew was contrary to 40 years of settled state law, without so much as acknowledging the existence of that contrary authority. Willful disregard by an appellate court of relevant judicial precedent that contradicts the court's ruling constitutes unethical judicial conduct. ABA Code of Judicial Conduct, Canon 2(A)("A judge should respect and comply with the law . . . ."); Cal. Code of Judicial Conduct, Rule 3.B.(2) ("A judge should be faithful to the law and maintain professional competence . . . ."); compare *Id.*, Commentary to Rule 1 (the mere fact that a judicial decision is "later determined to be incorrect legally" is not in itself a violation of ethical standards).

"Deliberately to turn the back upon . . . pertinent but uncomfortable authority, leaving it unmentioned and therefore leaving the question open as to how the matter now really stands, this is sin against the nature of our case law." LLEWELLYN, *supra*, at 256. In what is generally regarded as the best account of the process of appellate adjudication, Professor Llewellyn describes a deepening "crisis of confidence" in the appellate process, a crisis that has been caused in part by a lack of candor in appellate decisionmaking. "It is . . . not only its credit for candor, it is its credit for fairness, which a court throws into jeopardy when it thus suppresses in an opinion all mention of a pertinent authority which has been pointedly called to its attention." *Id.* at 258.

A state court ruling so lacking in candor and with so little basis in law or fact that it contradicts 40 years of settled doctrine is more than an erroneous application of state law. Mere errors of state law are not the concern of this Court. However, such an arbitrary exercise of judicial power rises to the level of a denial of due process. "Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but . . .

'the general law and immunities under the protection of the general rules which govern society,'. . ." *Hurtado v. California,* 110 U.S. 516, 535-536 (1884). Arbitrary power, denying protection and causing injury to the persons and property of citizens, is not law, whether manifested as the decree of an absolute monarch or the opinion of an appellate court. *Ibid.*

Moreover, when a court deliberately ignores relevant authority for the *purpose* of evading a federal constitutional question, the *purpose* to discriminate against a federal claim renders the court's conduct a violation of the Equal Protection Clause of the Fourteenth Amendment. See *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 264-268 (1977) (purposeful discrimination rather than mere discriminatory impact establishes a violation of equal protection).

The problem with correcting such unconstitutional abuses of judicial power is that when, as here, the offending opinion is unpublished, neither the state's highest court nor this Court is likely to exercise its discretionary power to review an opinion which, by virtue of its nonpublication, is generally regarded as insufficiently "important" to meet the standards for the exercise of judicial review. See Rules of Sup. Ct. of U.S., Rule 10; Cal. Rules of Ct., Rule 29(a). Indeed, under California's rules of court, an opinion, if unpublished, is by definition not "important" in the sense that it neither establishes a new rule of law, nor modifies an existing rule, nor creates an apparent conflict in the law, nor applies an existing rule to a new set of facts. Cal. Rules of Ct., rule 976(b). Intentional misapplications of state law aimed at avoiding federal constitutional claims, when secreted in unpublished opinions, are therefore capable of repetition, yet evading review. Cf. *Roe v. Wade, supra,* 410 U.S. 113, 125 (applying the "capable of repetition, yet evading review" standard to the issue of mootness).

Petitioner in fact requested publication of the Court of Appeal's opinion on the ground that the court's application of the waiver rule to his constitutional argument in a case which raised only a question of law on settled facts "is contrary to

Ward v. Taggert (1959) 51 Cal.2d 736, 742 . . . .," and therefore "creates an apparent conflict in the law" under Cal. Rules of Ct., rule 976(b). Petitioner's Letter Requesting Publication, App. 9. Given the court's refusal to grant petitioner's request for publication despite being put on notice regarding the apparent conflict between its ruling and a decision of the California Supreme Court, the conclusion appears inescapable that the only reason for failing to publish its opinion was to avoid appellate review of an obviously erroneous decision intended to evade a federal constitutional claim.

Non-publication of an appellate opinion for the purpose of preventing review of an unconstitutional evasion of a federal right is a classic example of an abuse "capable of repetition, yet evading review." *Roe v. Wade, supra,* 410 U.S. at 125. The knowing disregard of settled state law for the purpose of evading a federal question, the refusal by the Court of Appeal to publish its opinion for the purpose of avoiding review by this Court, and the likelihood that this kind of abuse of the appellate process will continue to escape review provide "special and important reasons," Supreme Court Rule 10.1, for invoking this Court's discretion to grant this petition.

The California Court of Appeal has so far departed from constitutionally and ethically accepted standards of appellate adjudication that the decision below concerning the issue of waiver constitutes a gross miscarriage of justice. Therefore, irrespective of whether the constitutional issue of reproductive choice presented by this petition is sufficiently important to warrant review by this Court, this petition should be granted at least for the purpose of determining whether the process of adjudication itself was so constitutionally flawed as to warrant remanding the case to the Court of Appeal with directions to address the federal question. Whatever the merits of the substantive constitutional claim, and they are considerable, petitioner is at least entitled under both state and federal constitutional law, to have that claim heard by the court below.

III. The Question of Reproductive Choice Presented by This Petition Affects Important Matters of National Policy Regarding the Meaning of Fatherhood and the Responsibility of Fathers to Support Their Children

The substantive question presented in this case is whether men, short of avoiding all sexual contact with women, have any real choice under the constitution about becoming fathers.

When it comes to defending voluntary motherhood, and the right not to support the life of an unborn child, women can rely on the constitutional right to an abortion recognized by this Court in *Roe v. Wade, supra,* 410 U.S. 113, and its progeny. When the principle at stake is one of voluntary *fatherhood,* a man who chooses not to support a child resulting from an unplanned pregnancy which a woman decides to carry to term is demonized as a "dead-beat dad" and remanded to jail if he is unwilling to meet his support obligations. The idea that a man, at least under some circumstances, should have a right to refuse to support a biological child he did not choose to bring into the world has been uniformly rejected by state courts, at least when the conception resulted from sexual intercourse.[5]

However defensible the system of child-support laws may be for divorced men who married with the intention of having children, the system is unjust when, as in this case, a man married with the express agreement not to have children, and his wife fraudulently violated that agreement. This is particularly true when, as here, the man, once he discovered the fraud, conscientiously avoided intercourse to prevent

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[5]See, e.g., *Stephen A.* v. *Roni L.*, 105 Cal.App.3d 640 (1980); *Pamela P. v. Frank S.*, 59 N.Y.2d 1 (1983); *Linda D. v. Fritz C.*, 38 Wash.App. 288 (1984); see generally Annot., "Parent's Child Support Liability as Affected by Other Parent's Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, or Refusal to Abort Pregnancy," 2 A.L.R.5th 337 (1992).

conception. Yet, *the prevailing concept of fatherhood imposes* a legal responsibility of child support upon petitioner merely because it was his sperm that resulted in the conception of the child. Such a concept of fatherhood gives too much power to women over men's procreation, just as the pre-*Roe* concept of motherhood gave too little power to women over their own procreation.

This Court has recognized that the mere biological connection between a man a child is not constitutionally sufficient to make a man a father in the eyes of the law when the issue is one of parental *rights.* See *Michael H. v. Gerald D.,* 491 U.S. 110 (1987) (biological father denied right to visitation); *Lehr v. Robertson,* 463 U.S. 248 (1983) (biological father denied right to block adoption). As Justice Scalia has observed, no one would suggest that a rapist should have the right to custody of a child conceived in the act of rape. *Michael H. v. Gerald D., supra,* 491 U.S. at 124, n. 4.

The related but unresolved issue, which this Court should settle, is whether there are any circumstances in which the biological connection is insufficient to establish legal fatherhood when the issue is one of parental responsibility rather than parental rights. Few would argue, for example, that child support liability should be imposed upon a man whose sperm contributed to conception when his semen was obtained in the robbery of a sperm bank. The unusual facts of this case, in which petitioner's semen was obtained by means that would be characterized at common law as larcency-by-trick. provide this Court with a unique opportunity to resolve the important question whether there is for men, as there is for women, some point along the continuum of human reproduction at which the biological connection alone is constitutionally insufficient to establish parental responsibilities.

CONCLUSION

This Court's adequate state ground jurisprudence indicates that an inadequate state ground will usually result in this Court's consideration of the underlying federal question, and petitioner urges this disposition here. However, the state court's avoidance of petitioner's federal constitutional claim so clearly and egregiously denied him due process of law that this case would also be appropriate for summary disposition by reversing and remanding to the state court for the purpose of considering the federal question.

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Respectfully submitted,

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